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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 984

CEDAR RAPIDS STEEL TRANSPORTATION, INC.,
Petitioner,

v.

IOWA STATE COMMERCE COMMISSION, ROCK ISLAND MOTOR TRANSIT, H & W MOTOR EXPRESS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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IOWA STATE COMMERCE COMMISSION, ROCK ISLAND MOTOR TRANSIT, H & W MOTOR EXPRESS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Cedar Rapids Steel Transportation, Inc., respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of the State of Iowa entered in the above case on September 5, 1968, and its denial of petitioner's petition for rehearing issued on November 12, 1968.

CITATIONS TO OPINIONS BELOW

The opinions, labeled Decision(s) and Order(s), of the Respondent, Iowa State Commerce Commission, are not reported and printed in Appendix B hereto. The decision of the District Court of the State of Iowa which combined for review the two Decisions and Orders of the Iowa State Commerce Commission is not reported and is printed in Appendix B hereto. The opinion of the Supreme Court of Iowa printed in Appendix B is not yet officially re-

ported. Its citation is 260 Iowa ——, 160 N.W. 2d 825. The decision of the Supreme Court which denied Petitioner's Petition for Rehearing without comment is not reported.

JURISDICTION

The judgment of the Iowa Supreme Court was entered on September 5, 1968, Appendix B infra. Due and timely petition for rehearing was filed and on November 12, 1968, rehearing was denied by the Iowa Supreme Court without comment.

Jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Questions presented for review are as follows:

1. Whether Petitioner, as holder of a permit issued by Respondent, Iowa State Commerce Commission, is entitled, under Section 474.28 of the Code of Iowa or Rules 320, et seq. of the Iowa Rules of Civil Procedure, to de novo review of an order of the Respondent Commission adversely affecting its permit, so as to provide Petitioner with due process and equal protection of the laws pursuant to the 14th Amendment to the Constitution of the United States.

2. Whether Petitioner in a hearing to revoke Petitioner's permit, which hearing is required by Section 327.16 of the Code of Iowa, is entitled by reason of due process under the 14th Amendment of the Constitution of the United States to know all of the material considered by the Respondent Commission, as well as by whom furnished in reaching its decision.

STATUTES INVOLVED

The statutes and constitutional provision involved in this matter are the following:

The 14th Amendment to the Constitution of the United States, particularly that part which provides:

> ". . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes involved are shown in Appendix A.

STATEMENT

After investigation, the Iowa State Commerce Commission, pursuant to Notice to the Petitioner to show cause why its truck operator permit should not be revoked, held a hearing in which it required Petitioner to "cease and desist" operations the Commission found to be unlawful. The Cease and Desist Order is included in the appendix. While Petitioner was seeking judicial review of this order, the Commission instituted a similar hearing stating Petitioner had not complied with the Cease and Desist Order and requiring Petitioner again to show cause why its permit should not be revoked. After hearing before the Commission, an order revoking Petitioner's permit was entered. The Revocation Order is included in Appendix B. Petitioner sought judicial review of this order also and the District Court combined the cases for trial.

The Petitioner brought original actions in Court challenging the Cease and Desist Order and Revocation Order in certiorari, alleging that the orders were arbitrary, capricious, without support in the record and contrary to the record. The Petitioner also asked for a de novo review in injunction and pursuant to Section 474.28 of the Code of Iowa which statute specifically provides for a de novo review of an order of the Respondent Commission by a railroad "aggrieved" by an order of the Commission.

The District Court held in certiorari, among other things, that the Respondent Commission

> "acted arbitrarily, capriciously and in excess of its jurisdiction by its use of and reliance upon matters outside the record in its determination of a judicial matter having a penalty as extreme as revocation of the (Petitioner's) permit, thereby denying (Petitioner) the right to be confronted with such evidence and to cross examine concerning it as well as denying (Petitioner) the opportunity to rebut such *'other things of which the Commission has knowledge'*."

The District Court also held that it had power in a statutory review under Section 474.28 and in a proceeding for Injunction under the Iowa Rules of Civil Procedure to make a de novo review and determine for itself whether Petitioner was operating unlawfully.

The Respondent Commission appealed to the Supreme Court of Iowa and urged that the District Court erred in finding that the Commission's issuance of the Cease and Desist Order and Revocation Order was arbitrary, capricious and without foundation and in holding that a carrier by motor truck aggrieved of a Commission order was entitled to de novo review in injunction and under Section 474.28 of the Code of Iowa.

The Iowa Supreme Court reversed the District Court and held, among other things, that use of material outside the Record by Respondent may have constituted error but that it was not prejudicial in the instant case. The Iowa Supreme Court held also that Section 474.28 is confined to "any railroad" aggrieved by an order of the Commission and was not available to carriers by truck, including Petitioner, and that injunction was available only as an auxiliary remedy to relief in certiorari.

In its petition in District Court, Petitioner alleged that the Respondent Commission's Cease and Desist Order and Revocation Order were arbitrary, capricious and based on no facts disclosed by the evidence. In its Petition for Rehearing, Petitioner alleged that the opinion of the Supreme Court denying Petitioner the right to a de novo review

under Section 474.28 of the Code of Iowa or in injunction under Rules 320, et seq., of the Iowa Rules of Civil Procedure denies to Petitioner due process of law and equal protection of the law to which Petitioner was entitled under the 14th Amendment to the Constitution of the United States and that the opinion of the Supreme Court holding that use of material outside the record may constitute error but is not prejudicial in the case at bar is a denial of due process of law under the 14th Amendment of the Constitution of the United States.

The Supreme Court of Iowa denied rehearing without comment.

REASONS FOR GRANTING THE WRIT

The Petitioner is but one of a substantial number of operators of trucks for compensation pursuant to the Iowa statutory regulatory scheme. The Iowa law puts railroads in a separate classification from motor truck operators for purposes of judicial review of Iowa State Commerce orders relating thereto.

Railroads have available a de novo review pursuant to statute, Section 474.28 of the Iowa Code, if they are "aggrieved" by a Commission order. The statute plainly states that it is available to "any railroad". It is silent as to carriers by truck. Petitioner urges here, as it did in the courts below, that the statute should be applicable to carriers by truck as well as by rail. The District Court so held and its decision was reversed by the Iowa Supreme Court. Petitioner urged on rehearing and urges here that grant of a de novo review to one type of carrier subject to regulation by the Respondent and a denial of de novo review to other types of carriers is a denial of equal protection and due process under the 14th Amendment to the Constitution of the United States.

Granted that differences exist between the regulatory scheme for rail and truck carriers which arise out of the

peculiar characteristics of each type of carrier; these differences, however, should have no bearing on the method by which judicial review of a regulatory order is obtained and the extent of such review.

It has been said that the right to appeal from an administrative order is statutory. Petitioner accepts this statement. It is Petitioner's contention, however, that statutory basis for a de novo review exists under Section 474.28 of the Code of Iowa. The problem arises out of the existence of appeal for rail carriers only and not for truck carriers. This is a denial of equal protection to all truck carriers. The only construction to be given the statute which squares with the Constitution is that it is likewise available to operators of trucks.

This Court, in *Rinaldi* v. *Yeager*, 384 U. S. 305, 16 L. Ed. 577, 86 S. Ct. 1497, in discussing a New Jersey statute stated at 384 U. S. 305, p. 308:

> "The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes. (citing cases) It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact * * * to be treated in law as though they were the same.' Tigner v. State of Texas, 310 U. S. 141, 147, 60 S. Ct. 879, 882, 84 L. Ed. 1124. Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance' to the purpose for which the classification is made.
>
> * * * *
>
> "This court has never held that the States are required to establish avenues of appellate review, but it

> is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

In *Baxstrom* v. *Herold*, 383 U. S. 107, 15 L. Ed. 2d 620, 86 S. Ct. 760, involving whether or not prisoners serving penal sentences were denied equal protection by a New York statute which did not allow a de novo jury determination of insanity before being committed to a mental hospital at the completion of his penal term while making it available to all other persons being civilly committed to a mental hospital, this Court, at 383 U. S. 107, 111, 86 S. Ct. 760, 762, stated:

> "It follows that the State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the 14th Amendment arbitrarily withhold it from some."

Petitioner urges here that the State of Iowa, having made a de novo review available to carriers by rail aggrieved at an order of the Respondent Commission, may not withhold it from carriers by truck which are aggrieved by an order of the Respondent Commission without violating the Equal Protection Clause of the 14th Amendment and that the Decision of the Supreme Court of Iowa in the instant case is contrary to the Equal Protection Clause in its holding that carriers by truck in Iowa are not entitled to the benefit of Section 474.28 of the Iowa Code.

The hearings before the Respondent Commission which culminated in revocation of Petitioner's permit were required under Iowa statutes. Section 327.14 of the Code of Iowa provides that such permits "shall be personal property . . ." and Section 327.16 provides that for "just cause, after due hearing, the commission may alter, amend or revoke any permit issued."

The Iowa statutes guarantee a due hearing before revocation. In its decision, following the first of two hearings for revocation, the Commission stated:

> "After reviewing carefully all the evidence and testimony received and other things of which it has knowledge, the Commission finds that (petitioner) is operating as a motor carrier of property for compensation without authority from the Commission and several points within a 100 mile radius of Cedar Rapids, Iowa."

After the second hearing, the Commission stated,

> "after carefully considering the evidence in this proceeding, the exhibits that were introduced at the hearing and other things of which it has knowledge, finds that the (Petitioner) is operating outside the scope of its truck operator permit in violation of the laws of Iowa."

Petitioner has found no cases involving precisely the issue before the Court in this case. One case somewhat similar, however, is *Shenandoah Suburban Bus Lines Case*, 355 Pa 521, 50 A2d 301, in which the Pennsylvania Supreme Court reversed an order canceling a certificate of public convenience and necessity.

In the case at bar, the Supreme Court held that sufficient evidence of unlawful activity was presented at the hearing so that if there were an error in going outside the record, Petitioner was not prejudiced thereby and no reversible error was committed.

The highest courts of the various states are not in accord as to whether use and consideration of evidence outside the record is prejudicial error which will nullify an administrative decision where it is supported by sufficient evidence on the record. Consideration of the case at bar will assist in resolving the conflict among the various states and will be of value in settling the rule for administrative agencies in all the various states.

This Court, in *Ohio Bell Telephone Company* vs. *Public Utilities Commission of Ohio*, 321 U. S. 292, 57 S. Ct. 724, stated:

> "What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of the secret investigation and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.' West Ohio Gas Company vs. Public Utilities Commission (1) Supra, 294 U. S. 63 at Page 69, 55 S. Ct. 316, 319, 79 LED 761 (and citing other cases)
>
> . . . .
>
> "Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent to the need, when power has been bestowed so freely, that the 'inexorable, safeguard' (St. Joseph Stockyards, Coe vs. United States, 291 U. S. 38, 73, 56 S. Ct. 720, 735, 80 LED. 1033) of a fair and open hearing be maintained in its integrity, Logan vs. United States, 298 U. S. 468, 480, 481, 56 S. Ct. 906, 911, 80 LED, 1288; Interstate Commerce Commission vs. Louisville & NRY Co., Supra."

This Court also held, in *Simmons* v. *United States*, 348 U. S. 397, 75 S. Ct. 397, that if the failure to disclose evidence is contrary to a right to a hearing conferred by statute, that the party affected need not show prejudice resulting from such failure.

As stated earlier, the highest courts of the various states which have considered the issue are not in agreement. Arizona, New York, South Carolina, Utah and Wisconsin appear to be of the opinion that the evidence outside the record was merely incompetent and limited their examination to the issue of whether there was sufficient competent evidence to support the decision.

On the other hand, California, Maine and Maryland have adopted the view that administrative decision based

on evidence outside the Record cannot be saved merely because there is evidence of record to support it. See Annotation at 18 ALR 2d 58 § 12.

A hearing to determine if good cause exists to revoke a permit is clearly a judicial hearing related as it is to existing facts and circumstances and a judgment based thereon. It raises the issue of a carrier's continuance in business based on whether its past operations have been proper or improper. In a case such as this, both elementary justice and the Due Process Clause of the 14th Amendment to the Constitution require the highest regard for the sanctity of the record so that one who is charged with improper conduct may know what evidence and what witnesses are being considered and weighed and may have opportunity to rebut and cross-examine concerning them.

The Court here has a opportunity to speak in a fashion which will settle this due process issue for all state agencies which have the awesome responsibility of granting and revoking permits.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully urges that the wirt of certiorari be granted.

Respectfully submitted,

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Des Moines, Iowa 50309

Counsel for Petitioner

APPENDIX A

RULES OF CIVIL PROCEDURE

320. Independent or auxiliary remedy. An injunction may be obtained as an independent remedy by an action in equity, or as an auxiliary remedy in any action. In either case, the party applying therefor may claim damages or other relief in the same action. An injunction may be granted as part of the judgment; or may be granted by order at any prior stage of the proceedings, and is then known as a temporary injunction. [Report 1943]

See also ch 664

327.1 Definitions. When used in this chapter:

1. The term "motor truck" shall mean any automobile, automobile truck, or other self-propelled vehicle, including any trailer, semi-trailer, or other device used in connection therewith, not operated upon fixed rails or track, used for the public transportation of freight for compensation, not operating between fixed termini, nor over a regular route, or used in connection with the transportation of property for compensation under an individual written contract.

2. The term "truck operator" shall mean any person operating any motor truck or motor trucks upon any highway in this state.

327.6 Permit. It is hereby declared unlawful for any truck operator or contract carrier to operate or furnish public service within this state without first having obtained from the commission a permit as hereinafter defined. Providing, however, that any person, firm, or corporation whose truck operator or contract carrier permit has been revoked for a willful violation shall be required to pay a fee of one hundred dollars in addition to the other fees required by this section before such person, firm or corporation shall be granted a new permit. And providing, further, that any person, firm or corporation whose permit has been revoked shall not operate as a truck op-

erator or contract carrier until such person, firm, or corporation shall have applied for and received a new permit from the commission. [C31, 35,§5105-c6; C39,§*5105.06;* C46, 50, 54, 58, 62,§327.6]

327.14 Permit—nature of. Permits issued hereunder shall be personal property and may be sold, transferred, leased, or assigned under such reasonable rules and regulations as may be fixed by the commission. [C31, 35,§5105-c13; C39,§*5105.14;* C46, 50, 54, 58, 62,§327.14]

327.16 Revocation of permit. For just cause, after due hearing, the commission may at any time alter, amend or revoke any permit issued. If the holder of the permit or his agent persists in a violation of any safety regulation prescribed by the department of public safety, the latter may recommend to the commission revocation of said permit and such violation shall be grounds for such revocation. [C31, 35,§5105-c15; C39,§*5105.16;* C46, 50, 54, 58, 62, §327.16]

474.28 Proceedings to vacate order. Any railroad aggrieved at any rule, order, or regulation made by the commission may institute proceedings in any court of proper jurisdiction to have the same vacated. If found by the court, after due trial, not to be reasonable, equitable, or just, and if upon an appeal from any rule, order, or regulation of the commission the complaining railroad is successful in having such rule, order, or regulation vacated, the aforesaid penalty shall be set aside. [S13,§2119; C24, 27, 31, 35, 39,§*7887;* C46, 50, 54, 58, 62,§474.28]

Referred to in §§ 474.30, 479.84

APPENDIX B

BEFORE THE

IOWA STATE COMMERCE COMMISSION

Docket No. N-3697

IN THE MATTER OF AN INVESTIGATION OF TRUCK OPERATOR PERMIT NO. 37971 ISSUED TO CEDAR RAPIDS STEEL TRANSPORTATION, INC., CEDAR RAPIDS, IOWA

CEASE AND DESIST ORDER

Docket No. N-3697

Complaints were received from several motor carriers in reference to the operation of Cedar Rapids Steel Transportation, Inc. of Cedar Rapids, Iowa. The matter was investigated by the personnel of the Motor Transportation Division of the Iowa State Commerce Commission and as a result of the investigation the Commission fixed Tuesday, October 15, 1963, at the offices of the Commission in Des Moines, Iowa, as the time and place for interested parties to appear and offer pertinent evidence and other information that would enable the Commission to determine whether Cedar Rapids Steel Transportation, Inc. was operating in violation of Chapter 325, Code of Iowa, 1962. The hearing was held at the appointed time and place and continued until October 25, 1963, when further hearing was held at the Linn County Courthouse in Cedar Rapids, Iowa.

Cedar Rapids Steel Transportation, Inc., hereinafter called "respondent" has been operating under Iowa Truck Operator Permit No. 37971 since July 23, 1953. The carrier has been operating since that time to the present time purportedly under authority of this truck operator permit and has obtained no other operating authority from the Commission.

The respondent's record indicates that commencing in the late spring of 1963 they began to furnish LTL intrastate service in conjunction with their interstate movements within a 100 mile radius of Cedar Rapids, Iowa. The abstracts of the shipments show clearly a regularity of service to and from numerous points within this 100 mile radius of Cedar Rapids.

The carrier contends that it is not in violation of Chapter 325 because the service it offers to the shipper is on an "on call" basis. To support its contention several witnesses testified in its behalf and the substance of their testimony was that there is an existing need for regular route operations to serve small towns in eastern Iowa. The shippers' testimony further indicated that the service provided by Cedar Rapids Steel Transportation, Inc.; is similar to the service provided by existing regular route operators.

It is evident from the testimony offered and exhibits introduced at the hearing that if the respondent continues with its present service from Cedar Rapids to Waterloo, Des Moines, Nevada, Oelwein, Marshalltown and Decorah, such service would be an unjust encroachment on the services provided by regular route motor carriers and would destroy or diminish the efficiency of their services to such an extent as would be contrary to the public interest.

After reviewing carefully all the evidence and testimony received and other things of which it has knowledge, the Commission finds that Cedar Rapids Steel Transportation, Inc., Cedar Rapids, Iowa is operating as a motor carrier of property for compensation without authority from this Commission to several points within a 100 mile radius of Cedar Rapids, Iowa. This type of operation is particularly evident from Cedar Rapids on one hand to Waterloo, Des Moines, Nevada, Oelwein, Marshalltown and Decorah on the other hand. The Commission further finds that the respondent has endeavored to create a regular route operation and has invited the public to apply for its services

between certain points in Iowa. Although the respondent claims that it is its duty to serve the public indiscriminately to all points within a 100 mile radius of Cedar Rapids, the results of its operation points clearly to a scheduled service between fixed points. The Commission further finds that the respondent is holding itself out to transport properly for compensation over relatively regular routes between other points in the confined area provided that its service can meet the needs and requirements of the shipping public.

IT IS, THEREFORE, ORDERED that the Cedar Rapids Steel Transportation, Inc., Cedar Rapids, Iowa, cease and desist from performing a motor carrier service as defined in Chapter 325, Code of Iowa, 1962, between fixed points in Iowa in which it is now rendering this service.

IOWA STATE COMMERCE COMMISSION

WALDO F. WHEELER
Chairman

BERNARD J. MARTIN
Commissioner

FRANK B. MEANS
Commissioner

BEFORE THE

IOWA STATE COMMERCE COMMISSION

Docket No. N-3697

IN THE MATTER OF AN INVESTIGATION OF TRUCK OPERATOR PERMIT NO. 37971 ISSUED TO CEDAR RAPIDS STEEL TRANSPORTATION, INC., CEDAR RAPIDS, IOWA

REVOCATION ORDER

This proceeding was instituted by the Iowa State Commerce Commission under the provisions of Section 327.16, Code of Iowa, to give Cedar Rapids Steel Transportation, Inc., Cedar Rapids, Iowa, holder of Iowa Truck Operator Permit No. 37971, an opportunity to show cause why its truck operator permit should not be revoked for operating as a motor carrier in the guise of a truck operator in violation of Chapter 325, Code of Iowa.

The history of this case leading to the present action is as follows: Complaints were received from several motor carriers that Cedar Rapids Steel Transportation, Inc., hereinafter called "respondent" was operating in violation of the Iowa law. An investigation of the respondent was conducted by this Commission and hearings held at the office of the Commission in Des Moines, Iowa on October 15, 1963, and continued until October 25, 1963, when further hearing was held at the Linn County Court House, Cedar Rapids, Iowa. Based upon the facts established at these proceedings, the Commission concluded that the respondent was operating in violation of Chapter 325, Code of Iowa, and ordered the respondent to cease and desist from performing motor carrier service between fixed points in Iowa to which it was then rendering service. When checks by the Commission's employees indicated that the respondent had failed to comply with the Commission's cease and desist order, this show cause proceeding was instituted and on June 1, 1964, the proceedings was ex-

panded to include the charge that the respondent was then presently operating as a motor carrier in the guise of a truck operator in violation of Iowa law.

Hearing was held on August 11, 1964, at the offices of the Commission in Des Moines, Iowa. The record of this hearing established that the respondent was operating over a regular route between Des Moines and Cedar Rapids, Iowa and a pattern of regularity between Des Moines, Cedar Rapids, Davenport and several smaller Iowa communities from March, 1964 through July 15, 1964.

The Commission after carefully considering the evidence in this proceeding, the exhibits that were introduced at the hearing and other things of which it has knowledge, find that the respondent is operating outside the scope of its truck operator permit in violation of the laws of the State of Iowa.

The Commission further finds that this constitutes just cause for the revocation of Cedar Rapids Steel Transportation, Inc. truck operator Permit No. 37971.

THEREFORE, IT IS ORDERED that Truck Operator Permit No. 37971 held by Cedar Rapids Steel Transportation, Inc., Cedar Rapids, Iowa, be and it is hereby revoked effective at midnight on January 11, 1965.

IOWA STATE COMMERCE COMMISSION

WALDO F. WHEELER
Chairman

BERNARD J. MARTIN
Commissioner

FRANK B. MEANS
Commissioner

IN THE DISTRICT COURT
OF THE STATE OF IOWA
IN AND FOR LINN COUNTY

IN EQUITY

Nos. 80240 and 80368

Filed, Dec. 12, 1966, 4:43 P.M., Clerk of Dist. Court, Linn County, Iowa

CEDAR RAPIDS STEEL TRANSPORTATION, INC.,
Plaintiff,

and

AMANA REFRIGERATION COMPANY, ET AL,
Intervenors,

vs.

IOWA STATE COMMERCE COMMISSION, WALDO F. WHEELER, BERNARD J. MARTIN and FRANK B. MEANS, COMMISSIONERS THEREOF,
Defendants,

and

H & W MOTOR EXPRESS COMPANY and
THE ROCK ISLAND MOTOR TRANSIT COMPANY,
Intervenors.

STATEMENT OF CASE, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT AND DECREE

This decision involves and affects two causes, Cause No. 80240 and Cause No. 80368. Both causes involve the same parties and the same law and facts. On January 25, 1965, with the consent of all parties, the two cases were consolidated for trial and determination by this Court. Thereafter, the consolidated matters came on for hearing on March 16, 1965. Plaintiff was represented by

John C. Eichhorn of Cedar Rapids and Robert R. Rydell of Des Moines; the defendant Commerce Commissioners and the Iowa State Commerce Commission were represented by John J. Goen, Commerce Counsel of the State of Iowa, and Mr. Leo J. Steffen, Jr., Assistant Commerce Counsel; intervenor for defendants, H & W Motor Express Company, was represented by D. C. Nolan of Iowa City; intervenor for defendants, Rock Island Motor Transit Company, was represented by J. H. Martin and Robert K. Gamble of Des Moines; intervenors for plaintiff, Amana Refrigeration, Inc., and The Chandler Company, and Cedar Rapids Pump and Supply Co., and Iowa Pipe and Supply Co. and Altorfer Machinery Co., and Hughes Bros. Co., were represented by Clinton H. Moyer and William A. Bergman of Cedar Rapids, Iowa. The full transcript and exhibits of the proceedings before the Commerce Commission were received; the Court heard the evidence in respect to explanation of the matter contained in the return to the writ of certiorari and also with respect to the other divisions of plaintiff's petition in both causes of action, and counsel made oral arguments, filed written briefs, and the Court having considered the pleadings and all of the foregoing and being duly advised now on this 12th day of December, 1966, renders its decision as follows:

STATEMENT OF CASE

The plaintiff, Cedar Rapids Steel Transportation, Inc., is the holder of truck operator permit 37971 issued by the State of Iowa, and is further the holder of irregular route authority issued by the Interstate Commerce Commission. The controversy concerns the status of plaintiff under its trucking operation. The Commission contends the plaintiff was operating in violation of Chapter 325, Code of Iowa, in that it was operating over regular routes or between fixed termini in Iowa. The Commerce Commission bases its contention as a result of hearings held before the Commission in October of 1963 and in August of 1964 and

the same are indexed in the records of the Iowa State Commerce Commission as Docket No. N-3697.

The Commission after its first hearing in 1963, on March 9, 1964, ordered the plaintiff to "cease and desist from performing a motor carrier service as defined in Chapter 325, Code of Iowa, 1962, between fixed points in Iowa in which it is now rendering this service".

After the hearing in August of 1964, the Commission revoked the plaintiff's Iowa Truck Operator Permit No. 37971 on the basis that plaintiff had failed to comply with the Commission's previous "cease and desist order" and that the plaintiff was operating outside the scope of its truck operator permit in violation of the laws of the State of Iowa.

Plaintiff began its actions in Linn County District Court in contest of the Commission's "cease and desist order" and also in contest of the "revocation order". The plaintiff filed its first petition in regard to the "cease and desist order" on June 1, 1964, and was known as Equity Cause No. 80240 and consisted of two divisions. The first division was one in certiorari and the other asking for general equitable relief. The plaintiff filed its second cause of action on January 7th, 1965, known as Cause No. 80368 and this concerned the order of revocation by the Commerce Commission. Plaintiff's petition, Cause No. 80368 was in three divisions, the first being in certiorari and also asking for a stay of proceedings until a determination by the Court, and the second division asked for a hearing under Section 474.28 of the Iowa Code and asking for a finding by the Court that the decision of the Commission be ruled inequitable and unreasonable, and Division III asking for general equitable relief and asking also for a temporary and permanent injunction enjoining the Commission from the enforcement of its revocation order. The plaintiff is presently operating under a temporary stay order issued by this Court on January 25, 1965.

JUDGMENT IN CERTIORARI

In weighing the merits of Division I of plaintiff's petitions, the Court has examined the record of the proceedings before the defendant Commission in both Equity No. 80240 and No. 80368 (Defendant's Docket N-3697) for the strict purposes only of determining whether the evidence before the defendant Commission was sufficient to sustain its decisions and whether the proceedings were arbitrary, capricious, in excess of the jurisdiction conferred upon the Commission by the General Assembly or were otherwise illegal.

Having so examined the record made before the defendant Commission, it is the judgment of this Court that the defendant Commission acted arbitrarily, capriciously, and unlawfully in the matter before it in its Docket N-3697 by its failure to follow its own Rules of Procedure in proceeding against the plaintiff. (Iowa Departmental Rules, 1962).

It is the judgment of this Court that the defendant Commission acted arbitrarily, capriciously, and without any foundation in the record by its issuance of a cease and desist order against the plaintiff and also by revocation of plaintiff's Truck Operator Permit 37971.

It is the judgment of this Court that the defendant Commission acted arbitrarily, capriciously, and without any foundation in the record in its failure to provide in the "cease and desist" order or at any time before the revocation any specific acts or method of operation of the plaintiff which, in the judgment of the Commission, constituted service as a Motor Carrier under Chapter 325 of the Code without proper certificate and by its failure to state affirmatively what service plaintiff, or other holders of truck operator permits under Chapter 327, may properly perform as irregular route operators in public transportation.

It is the judgment of this Court that the defendant Commission acted illegally and in excess of its jurisdiction in

proceeding against the plaintiff by means of a hearing before it, following the conclusion of its own investigation, for the reason that no statutory foundation exists for such procedure.

It is the judgment of the Court that the defendant Commission acted arbitrarily, capriciously and illegally by its failure to properly apply the law set forth in the Blecha & Owens, Ooten, Mercer and Lischer cases, infra, in weighing the question of whether plaintiff was holding itself out as a regular route motor carrier as regulated by Chapter 325 of the 1962 Code of Iowa.

It is the judgment of the Court that the Commission acted arbitrarily, capriciously, and in excess of its jurisdiction by its use of and reliance upon matters outside the record in its determination of a judicial matter having a penalty as extreme as revocation of the plaintiff's permit, thereby denying plaintiff the right to be confronted with such evidence and to cross examine concerning it as well as denying plaintiff the opportunity to rebut such "*other things of which the Commission has knowledge*".

It is further the judgment of this Court that the record made before the Commission when taken as a whole amply demonstrates bias on the part of the Commission and that such constitutes arbitrariness and capriciousness within the meaning of certiorari.

The writ of certiorari is therefore sustained and the "cease and desist" and "revocation" orders of the Iowa State Commerce Commission in its Docket N-3697 dated March 9, 1964, and December 21, 1964, respectively, are hereby declared null and void.

FINDINGS OF FACT

In considering the claims of the plaintiff under Division II of the petition in Equity 80240 (the "cease and desist" matter) and under Divisions II and III in Equity 80364 (the revocation matter), the Court hereby enters its findings of fact and conclusions of law as follows:

1. The plaintiff herein is the holder of Truck Operator Permit 37971 issued by the defendant Commission and is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission generally authorizing transportation of shipments in interstate commerce between Cedar Rapids, Iowa, and points within a hundred mile radius thereof over irregular routes.

2. That in 1963 plaintiff commenced a service in intrastate commerce throughout the state in conjunction with its interstate shipments. In the latter part of 1963 after receiving apparently oral complaints from motor carriers, the defendant Commission sent inspectors to the headquarters of plaintiff who examined its records and made abstracts of each intrastate shipment throughout the period covered. The inspectors talked with consignors and consignees and followed plaintiff's vehicles. Robert Powell, defendant's Superintendent of the Motor Transportation Department, concluded from the investigation that plaintiff was operating between fixed termini between various Iowa points.

3. A notice of hearing was then issued by defendant informing plaintiff that evidence produced by the Motor Transportation Department indicated that service rendered by plaintiff "constitutes motor carrier service as defined by Chapter 325" and hearing was to be held to afford plaintiff an opportunity to show cause why the truck operator permit issued to it should not be revoked. A hearing of two days' duration was held at Des Moines, Iowa, on October 15 and 16, 1963, at which time testimony by the defendant Commission was adduced. At Cedar Rapids, Iowa, on October 25 and 31, 1963, testimony of the plaintiff and rebuttal testimony of the defendant was presented. The motor carrier Intervenors offered no evidence.

4. According to the testimony and competent exhibits before the Commission in both the hearings in October, 1963, and on August 11, 1964, the daily intrastate movements of the plaintiff are over irregular routes and be-

tween points and places determined by the freight tendered to plaintiff for delivery within the state. Plaintiff maintains no printed or other schedule of truck movements whereby a shipper may know that plaintiff has a truck leaving a designated shipping point at a prescribed time which will arrive at designated towns for deliveries at regularly scheduled times. Plaintiff's tariff does not maintain such point to point rates as to indicate a preference or holding out for traffic between any particular termini. Concentration of traffic, if any, is the result of shipments tendered to the plaintiff for delivery and is not the result of the effort or design of plaintiff to obtain shipments destined to a particular point. The service of plaintiff did not result in elimination or substantial curtailment of any competing service by either motor carriers or truck operators. The plaintiff has not refused to handle any intrastate shipments tendered to it regardless of its origin or destination in Iowa.

CONCLUSIONS OF LAW

1. A motor carrier is a common carrier over regular routes and between fixed termini. A motor carrier is required to obtain a certificate of public convenience and necessity under Chapter 325 of the Iowa Code. It is sometimes referred to as a regular route common carrier.

2. A truck operator is a common carrier which does not operate over regular routes or between fixed termini and is often referred to as an irregular route common carrier. A Truck Operator Permit is granted pursuant to Chapter 327 of the Iowa Code.

3. A common carrier is one which holds himself out as ready to engage in the transportation of goods for hire as a public employment for all persons indifferently within the limits of his capacity. A regular route common carrier in Iowa is one who undertakes so to engage over certain prescribed established roads and between fixed points.

4. That under the leading Iowa case relating to truck operators, State of Iowa ex rel Board of RR Commissions v. Blecha & Owen Transfer, et al, 213 Iowa 1269, 239 NW 125, the decisive factors of irregular route common carriage were whether or not the shipper made a call for service before a trip was made and whether the routes traversed and termini served were fixed and predetermined. Subsequent cases regarding truck-operators, i.e. State ex rel Board of RR Comms. v. Ooten, 215 Iowa 543, 243 NW 329; State ex rel Bd. v. Mercer, 215 Iowa 611, 246 NW 406; State ex rel Bd. v. Lischer Bros, 223 Iowa 588, 272 NW 604, indicate that the criteria of the Blecha and Owen case, supra, are tempered to the extent that the truck operator may not concentrate its movements between particular points, or by setting up time schedules of movements between particular points, or maintain rates which are designed and held out to obtain a concentration of traffic between particular points. The operation of Truck Operators must be measured by application of all these tests, no one of which is exclusive.

5. That under Section 474.28 of the Code of Iowa, this Court may make a de novo review of the orders of the Commission in this case and may set the same aside if, after due trial, the same are found not to be reasonable, equitable, or just.

6. That this Court may, upon proper petition, enjoin the operation of an administrative order or decision, including those issued by the defendant Commission. That upon such suit for injunction the Court is required to make a de novo review of the record.

7. That a de novo review of the record before the Commission shows that the plaintiff herein was, as of the dates material to these proceedings, lawfully conducting itself as an irregular route common carrier under its Truck Operator Permit under Chapter 327 of the Iowa Code as interpreted by the Supreme Court. In making this determination the Court is not unmindful of the Circle Express

case, Circle Express Co. v. Iowa State Commerce Commission, 249 Iowa 651, 86 NW 2d 888 which is distinguished on its facts and further, was tried and submitted in certiorari only.

IT IS, THEREFORE, HEREBY ADJUDGED, ORDERED AND DECREED that the decisions of the defendant Commission in requiring plaintiff to cease and desist its operations and revoking plaintiff's Truck Operator Permit are not reasonable, equitable, or just and the same are hereby vacated, set aside, and held for naught.

The Revocation Order of the defendant Commission in its Docket N-3697 dated December 21, 1964, revoking the permit of the plaintiff on the record submitted herein is hereby permanently enjoined.

The costs herein are taxed as follows: without respect to costs of antecedent proceedings, all costs taxed by the Clerk of this Court in each of the foregoing cases are assessed against the defendants Iowa State Commerce Commission, Waldo F. Wheeler, Bernard J. Martin and Frank B. Means, Commissioners thereof.

/s/ Lawrence J. Rees
Judge of the District Court
18th Judicial District of Iowa

IN THE SUPREME COURT OF IOWA

CEDAR RAPIDS STEEL TRANSPORTATION, INC.,
Appellee,

and

AMANA REFRIGERATION COMPANY, ET AL.,
Intervenor-Appellee,

v.

IOWA STATE COMMERCE COMMISSION, BERNARD J. MARTIN, FRANK B. MEANS and DICK A. WITT, Commissioners thereof,

Appellants,

H & W MOTOR EXPRESS COMPANY and
THE ROCK ISLAND MOTOR TRANSIT COMPANY,
Intervenors-Appellants.

Filed Sept. 5, 1968

Appeal from Linn District Court
WARREN J. REES, Judge.

Two separate district court actions by plaintiff truck operator permittee, consolidated for purpose of trial and appellate review, each seeking relief by certiorari and injunction following issuance of cease and desist, and revocation of permit orders by defendant Iowa State Commerce Commission, resulted in holding by trial court adverse to defendant commission, and it appeals.—Both cases reversed and remanded with instructions.

Leo J. Steffen, Jr., Commerce Counsel, and Daniel J. Fay and Susan Thomas, Assistant Commerce Counsel, of Des Moines, for appellants.

D. C. Nolan, of Iowa City, for intervenor-appellant, H & W Motor Express Company.

Gamble, Riepe, Martin & Webster, of Des Moines, for Intervenor-appellant, The Rock Island Motor Transit Company.

Robert R. Rydell, of Des Moines, and John C. Eichhorn, of Cedar Rapids, for appellee.

Clinton H. Moyer and Wm. A. Bergman, of Cedar Rapids, for intervenors-appellees, Amana Refrigeration, Inc.; The Chandler Company; Cedar Rapids Pump & Supply Co.; Hughes Bros. Co.; Altofer Machinery Co.

RAWLINGS, J.

Defendant, Iowa State Commerce Commission, ordered plaintiff truck operator permittee cease unlawful conduct of business, followed by order revoking permit. Plaintiff's two separate district court actions, each seeking relief by certiorari and injunction, were consolidated for trial. Defendant appeals from trial court's decree annulling both orders and enjoining their enforcement.

For convenience, plaintiff, Cedar Rapids Steel Transportation, Inc., and defendant, Iowa State Commerce Commission, will sometimes hereafter be referred to as petitioner, or permittee, and respondent, or defendant commission, respectively. In addition we shall disregard the fact individual commission members are also made defendants.

Petitioner holds a "truck operator permit" issued by respondent.

Incidentally, though not here relevant, petitioner also possesses a certificate issued by Interstate Commerce Commission classified as interstate irregular route radial authority.

Defendant commission caused permittee's operations to be investigated. There followed adoption of a resolution and giving of notice September 27, 1963, for permittee to appear and show cause why its truck operator permit should not be revoked.

Hearing was accordingly held commencing October 15, 1963. From evidence presented defendant commission found, in substance, since 1963 permittee had, (1) been

actively soliciting intrastate traffic; (2) been operating between fixed termini; (3) been operating over relatively regular routes; (4) made regular customer stops for shipments, in some instances five days every week, with no shipper pickup-calls having been made; (5) charged uniform rates; and (6) rarely refused shipments.

Upon this basis defendant commission issued an order, March 9, 1964, to the effect permittee cease and desist operating as a motor carrier between fixed points in Iowa.

Subsequently another investigation was made as to conduct of permittee's trucking business. May 13, 1964, defendant commission by resolution ordered permittee again appear and show cause why its permit should not be revoked. Upon notice given, permittee appeared and hearing was later held.

June 1, 1964, petitioner, by district court action, sought relief by certiorari, and injunction, from the aforesaid cease and desist order. Respondent made return and answered.

Evidence presented at the second revocation hearing revealed permittee's modes and methods of operation, disclosed at the first commission hearing, had not been discontinued. In fact its original terminal at Cedar Rapids had been supplemented by establishment of one in Davenport.

December 21, 1964, defendant commission ordered revocation of permittee's state issued truck operator permit.

January 7, 1965, petitioner filed its second action in district court, this time asking a writ of certiorari issue and injunctive relief be granted relative to respondent's permit revocation order. Again respondent made return and answered.

As heretofore disclosed the two cases brought by petitioner were consolidated and tried to the court upon the transcript of testimony heard by defendant commission,

with other explanatory evidence presented. Rule 315, Rules of Civil Procedure.

Decree issued by trial court vacated both of respondent's challenged orders, and permanently enjoined their enforcement. The two cases are likewise consolidated for purpose of this appeal.

Respondent contends trial court erred in, (1) holding petitioner was lawfully operating under a state truck operator permit as an irregular route carrier; (2) finding respondent, in issuing the cease and desist, and revocation orders, acted arbitrarily, capriciously, unlawfully, and without foundation; and (3) reviewing de novo respondent's orders and in granting injunctive relief.

These assigned errors will not be dealt with in the order presented.

I. Examination of petitioner's pleadings discloses, in both cases, relief sought by it is basically that obtainable in certiorari, aided by injunctive relief as an auxiliary remedy. See rules 306-330, R.C.P.

However, trial court held, Code section 474.28 permitted a de novo review of the challenged orders issued by respondent. We do not agree.

The aforesaid statute is clearly confined to "any railroad" aggrieved by a rule, order or regulation made by defendant commission. Petitioner fails to so qualify.

Furthermore, Code section 327.4 neither expressly nor impliedly serves to afford appellate relief or de novo review of any rule, order or regulation issued by respondent. It provides: "All control, power, and authority over railroads and railroad companies, motor vehicles and motor carriers now vested in the commission, insofar as the same are applicable, are hereby specifically extended to include truck operators and contract carriers." If the legislature had intended this act be extended to accord truck operators and contract carriers all appellate rights and

remedies granted railroads and railroad companies relative to any rule, order or regulation issued by the commerce commission it could easily have so declared. This it did not do.

To give section 474.28 the construction accorded it by trial court, would require reading into that statute an intent and meaning not therein expressed. The courts of this state do not possess any such prerogative. See Bergeson v. Pesch, 254 Iowa 223, 227-229, 117 N.W.2d 431.

Petitioner asserts State ex rel. Board v. Holdcroft, 207 Iowa 564, 221 N.W. 191, by analogy, upholds trial court's appellate review of the cases at bar. No useful purpose will be served by an extended analysis of the facts and holding in the cited case. There we were dealing with the right of defendant commission's predecessor to enforce its orders by invocation of judicial action. We find in it no semblance of support for the position here taken by petitioner.

Moreover, section 327.4, quoted supra, is clearly confined to the matter of control, power and authority by defendant commission over motor vehicles and motor carriers operating within the state. See State ex rel. Board v. Holdcroft, supra. As aforesaid, it does not extend remedial rights or review by appeal to any contract carrier or truck operator aggrieved by a commission adjudication and we cannot read such intent and purpose into the law. See Bergeson v. Pesch, supra.

Without question right of appeal is purely a creature of statute. Carmichael v. Iowa State Highway Commission, Iowa , 156 N.W.2d 332, 335; Merritt v. Interstate Power Co., Iowa, 153 N.W.2d 489, 492; and 2 Am.Jur.2d, Administrative Law, section 557, page 366.

And a search of Code chapter 327 fails to reveal appellate review is provided truck operators or contract carriers desiring to challenge an adjudicatory order issued by the state commerce commission.

In addition Code section 325.21 is not here applicable. In the first place it applies only to certificated or motor carriers. Next, it merely provides right of appeal from denial by the commerce commission of an application for certificate of convenience and necessity. At the same time, existence of this statutory enactment serves to disclose the significance attendant upon omission of any appellate rights in chapter 327 of the Code.

We now hold Code section 474.28 is not here applicable.

II. On the other hand, absence of statutory right of appeal does not serve to deprive petitioner of any judicial review. See rule 306, Rules of Civil Procedure, and Appanoose Co. R. Tax Assoc. v. Iowa State Tax Com'n., Iowa , 158 N.W.2d 176, 182.

As we said in Hohl v. Board of Education, 250 Iowa 502, 508-509, 94 N.W.2d 787: "Certiorari is the method of bringing the record of an inferior tribunal before the court for the purpose of ascertaining whether the inferior tribunal or body had jurisdiction and whether its proceedings were authorized. See 19 Iowa Law Review 467. Clearly, it comes within the supervisory functions of the appellate courts and is necessary to keep all such bodies within their proper functions and to prevent them from acting in an illegal manner. It is an extraordinary remedy, and the courts may make it *available to all persons* who may show a substantial interest in the matter challenged. (Authorities cited.)

"The writ of certiorari is distinguishable from appeal in that certiorari prevents the body performing or exercising a judicial or quasi-judicial function from violating principle of jurisdiction or exceeding the scope of its authority, while appeal is aimed to relieve the individual litigant substantively or from mistake in applying adjective law. Where the body has jurisdiction to determine a question of fact, it is emphatically stated that the writ is not a substitute for appeal, and of course that question is not a ground for certiorari. (Authorities cited.)"

Dealing with a procedural situation not unlike that involved in the cases at bar, we said in Circle Exp. Co. v. State Commerce Comm., 249 Iowa 651, 653-654, 86 N.W.2d 888: "It is not the duty of the court of review findings of fact by the lower tribunal having jurisdiction, if sustained by any competent and substantial evidence (unless of course it otherwise acted illegally) *and the court should only examine the evidence submitted to determine whether there is any competent and substantial evidence to support the findings.* (Authorities cited.)" (Emphasis supplied) See also rules 306, 315, 317 R.C.P., Staads v. Board of Trustees, Iowa , 159 N.W.2d 485, 490; Koelling v. Trustees of Skiff Hospital, 259 Iowa 1185, 1206, 146 N.W.2d 284; Wood v. Iowa State Commerce Commission, 253 Iowa 797, 801-803, 113 N.W.2d 710; and 14 Am. Jur. 2d, Certiorari, sections 63-67, pages 829-833.

As stated in Powers v. McCullough, 258 Iowa 738, 741, 140 N.W.2d 378: "* * * a trial de novo is not permitted on certiorari and only questions of law are presented."

Additionally the burden is on respondent to show petitioner exceeded its jurisdiction or otherwise acted illegally. Smith v. City of Fort Dodge, Iowa , N.W.2d , opinion filed July 18, 1968, and citations; Sueppel v. Eads, Iowa , 156 N.W.2d 115, 117; and Mangan v. Department of Public Safety, 258 Iowa 359, 364, 138 N.W.2d 922.

Petitioner's actions stand in certiorari and trial court erred in reviewing de novo respondent's "cease and desist" and "revocation" orders.

III. Turning now to the matter of applicable substantive law, an examination of relevant statutes discloses no precise definition of a "truck operator". However, the rights and privileges accorded by law to any such permittee are, by exclusion, reasonably determinable.

What is now designated as Code chapter 325 is confined to certificated or motor carriers. To the extent here rele-

vant it first appeared as chapter 252-A1, Code, 1927. Sections 5105-a6 of that act stated: "It is hereby declared unlawful for any motor carrier to operate or furnish public service within this state without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation."

In 1953 the Fifty-Fifth General Assembly amended this law to provide: "It is hereby declared unlawful for any motor carrier to transport over a regular route or between fixed termini any person or property, for compensation, from any point or place in the state of Iowa to another point or place in said state irrespective of the route, highway or highways traversed, including the crossing of any state line or the state of Iowa, or the ticket or bill of lading issued and used for such transportation, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation." See section 325.6, Codes, 1954, 1958 and 1962.

Amendments in 1959 and 1963 relative to carriers of passengers operating on charter are not here involved. See Acts of the Fifty-Eighth General Assembly, chapter 248, section 2, and Acts of the Sixtieth General Assembly, chapter 213, section 1.

During all this period of time the definitive provisions of Code sections 325.1 and 327.1 remained the same.

When, in 1953, the legislature enacted that amendment quoted supra, the intent must have been to effect a change in existing law. As we said in Consolidated Freightways Corp. v. Nicholas, 258 Iowa 115, 125, 137 N.W.2d 900: "Usually when an amendment is adopted, it is presumed the legislature intended to make a change in the existing law, and courts will therefore endeavor to give some effect to the amendment."

Significantly one material change effected by the aforesaid amendment was that of making it unlawful for other than a certified carrier to transport persons or property

over a regular route or between fixed termini from any point or place in Iowa to another point or place in the state, irrespective of the highway or highways traversed.

Briefly stated, this means those engaging in transportation for compensation over a regular route or between fixed termini, are required to obtain a certificate of public convenience and necessity.

As the author of an article in 33 Iowa L. Rev. 315, 316, said: "Whether the carrier operates between fixed termini, or over a regular route, determines whether it is subject to the more stringent provisions of the certificated motor carrier law, which require the carrier to obtain a certificate of public convenience and necessity."

Next, Code section 327.1(5) states: "The term 'contract carrier' shall mean any person who does not hold out to the general public to serve it indiscriminately and who, for compensation, engages in the business of transportation of property by motor truck under individual written contracts, thereby providing a special and individual service required by the peculiar needs of a particular shipper, but does not include, (1) a motor carrier as defined in chapter 325, (2) a truck operator, or (3) a person whose transportation by motor vehicle is in furtherance of a private enterprise other than the business of transportation for others for compensation." See also Circle Exp. Co. v. State Commerce Comm., 249 Iowa 651, 86 N.W.2d 888.

Under existing statutes it must be conceded a truck operator permittee is neither a certificated nor contract carrier.

Now, with regard to truck operators, section 327.1 provides, in material part:

"1. The term 'motor truck' shall mean any automobile, automobile truck, or other self-propelled vehicle, including any trailer, semi-trailer, or other device used in connection therewith, not operated upon fixed rails or track, used for

the public transportation of freight for compensation, not operating between fixed termini, nor over a regular route, or used in connection with the transportation of property for compensation under an individual written contract.

"2. The term 'truck operator' shall mean any person operating any motor truck or motor trucks upon any highway in this state.

"3. The term 'highway' shall mean every street, road, bridge, or thoroughfare of any kind in this state."

In Circle Exp. Co. v. State Commerce Comm., supra, loc. cit., 249 Iowa 660, this court stated: "Encroachment by contract carriers in the field of service rendered by common [certificated] carriers, whether by design or subterfuge, cannot be permitted."

By the same token a truck operator permittee cannot engage in any function, service or transportation restrictively performable under the law by either a certificated or contract carrier.

IV. The main thrust of the question now posed relates to the functional difference between a certificated or motor carrier on one hand, and truck operator on the other.

We said in State ex rel. Board v. Ooten, 215 Iowa 543, 544, 243 N.W. 329: "The distinction made as between the two kinds of operators is one that can become exceedingly difficult of practical application. A truck operator who operates between fixed termini and on a regular route is readily identified. But when one operates upon any and all routes and between any and all termini, it becomes a question of degree whether sooner or later his business may not concentrate upon a regular route and two fixed termini."

In several other cases this court has been called upon to deal with the problem at hand. As a result it appears some general criteria have been established which, though in no one instance alone controlling, may be helpful in

determining whether a motor truck is operating between "fixed termini or over a regular route". Has the operator, (1) advertised or solicited business, or carried only when called; (2) made more or less regularly scheduled trips, or carried only according to call; (3) made trips between different termini on the basis of calls received, or were the termini generally established, declared, or commonly known; (4) used different routes according to calls received, or were generally established and commonly known routes used with reasonable regularity; (5) established regular or commonly known, fixed, or terminal rates, or made variable charges according to loading and unloading time, weight, volume, distance, etc.; (6) usually and customarily accepted all goods for transit, or refused to carry in any substantial number of instances; (7) adopted standing and more or less regular pickup arrangements, either oral or written, with shippers at any given termini, or picked up freight and hauled only on the basis of calls received.

Of course, all these elements need not be present or shown to exist before an operator can be said to be transporting goods between fixed termini or over a regular route. If in fact it be established a truck operator is engaging in the transportation of property for hire in accord with generally predetermined and commonly known plans or arrangements, between generally established and commonly known fixed points or termini, with more or less regularity or over a generally established and commonly understood regular route, he may then ordinarily be said to be operating between fixed termini or over a regular route.

With regard to the foregoing see Circle Express Co. v. Iowa State Commerce Commission, 249 Iowa 651, 86 N.W. 2d 888; State ex rel. Board v. Lischer Bros., 223 Iowa 538, 272 N.W. 604; State ex rel. Board v. Thompson, 217 Iowa 994, 252 N.W. 256; State ex rel. Board v. Lischer Bros., 215 Iowa 607, 246 N.W. 264; State ex rel. Board v.

Mercer, 215 Iowa 611, 246 N.W. 406; 47 Iowa L. Rev. 637; and 33 Iowa L. Rev. 315, 316.

V. The facts here presented are understandably somewhat involved, and in some instances controverted. However, evidence emanating from both hearings conducted by defendant commission resulting in the cease and desist, and revocation orders, is basically the same. When summarized, the record reveals the factual situation to be substantially as follows: Petitioner operates intrastate under a truck operator permit, its principal place of business being in Cedar Rapids.

Statements from some of petitioner's customers and drivers were obtained and its intrastate operations for the quarterly periods June, July, August and September, 1963, and for February, March, April, May and June, 1964, were abstracted in the course of investigations conducted by the motor transportation division of the Iowa State Commerce Commission.

Among customers so contacted were Firestone Tire and Rubber of Des Moines, Pittsburg Plate Glass, Goodyear Tire and Rubber of Des Moines, and Cities Service Oil Corporation. Testimony presented by officers of these concerns discloses they were first contacted by petitioner's representatives and advised, usually with reference to a map, as to the area in eastern Iowa served by petitioner; that subsequent to these initial contacts, petitioner's trucks stopped every weekday morning at the Pittsburg Plate Glass and Goodyear Tire establishments, and at Firestone and Cities Service every afternoon. It was also revealed, these concerns never called petitioner relative to shipments to be made, but as a matter of custom and practice its trucks stopped regularly five days a week for a pickup or shipments, if any, to be made. The same witnesses also stated petitioner never refused any of their shipments, but they did understand deliveries in the Knoxville-Creston area were not desired.

Furthermore, evidence obtained from one of petitioner's drivers disclosed he seldom deviated from the route which took him over the interstate highway, and highways 6, 30 and 149, five days every week.

Petitioner, through its president Herald Smith, and others, testified to the effect it had interstate authority to operate within a 100 mile radius of Cedar Rapids on an irregular route basis. Mr. Smith said petitioner insisted on calls to its offices for pickup service. He also stated petitioner generally had a truck going every day to the Clinton-Davenport-Keokuk area and one going in the general direction of Decorah, Davenport and Dubuque, as well as from Cedar Rapids to Des Moines. His testimony further reveals that since receiving interstate authority petitioner had been actively soliciting intrastate traffic within the area of its Iowa interstate operations but at no time did it engage in advertising.

By virtue of the foregoing defendant commission issued the challenged cease and desist order. In so doing it found permittee to be, "operating as a motor carrier of property for compensation without authority from this Commission to several points within a 100 mile radius of Cedar Rapids, Iowa. This type of operation is particularly evident from Cedar Rapids on one hand to Waterloo, Des Moines, Nevada, Oelwein, Marshalltown and Decorah on the other hand. The Commission further finds that the respondent has endeavored to create a regular route operation and has invited the public to apply for its services between certain points in Iowa. Although the respondent [permittee] claims that it is its duty to serve the public indiscriminately to all points within a 100 mile radius of Cedar Rapids, the results of its operation points clearly to a scheduled service between fixed points. The Commission further finds that the respondent [permittee] is holding itself out to transport property for compensation over relatively regular routes between other points in the confined area provided that its service can meet the needs and requirements of the shipping public."

Petitioner was thereupon ordered to, "cease and desist from performing a motor carrier service as defined in Chapter 325, Code of Iowa, 1962, between fixed points in Iowa in which it is now rendering this service." No application for rehearing was ever filed.

As previously stated the subsequent or second hearing disclosed petitioner had not so altered operations as to bring it within the terms of the cease and desist order, but had in addition acquired another terminal in Davenport.

Defendant commission accordingly found petitioner was operating in violation of its truck operator permit and issued the controverted revocation order.

We are satisfied there is substantial, competent evidence disclosing petitioner, (1) solicited intrastate business for the limited area of its interstate authority; (2) seldom operated on call, its practice being to regularly stop at customer points for anticipated shipments; (3) made commonly known daily trips between Cedar Rapids, Des Moines, Waterloo and Davenport; (4) made more or less commonly known and regular trips between Cedar Rapids, Nevada, Oelwein, Marshalltown and Decorah; (5) maintained two terminals, one in Cedar Rapids, the other in Davenport; (6) used regular and commonly known daily routes; (7) had an established understanding with certain customers to stop daily for possible shipments.

This in turn means there is substantial and competent evidence supporting both the cease and desist and the revocation orders issued by respondent. Trial court erred in holding to the contrary.

VI. However, petitioner claims, and trial court agreed, respondent acted arbitrarily, unreasonably and capriciously in that it, at least in part, relied upon undisclosed results of independently conducted prehearing investigations in finding petitioner's operations were in violation of its

truck operator permit. We find no merit in this proposition.

In support of its position petitioner cites and leans heavily on In re Lone Tree Community School District, Iowa , 150 N.W.2d 637. But that case is readily distinguishable on both facts and law. There the department of public instruction, a supervisory administrative agency, conducted a post-hearing survey, never disclosed to interested parties, and for the most part based its ultimate quasi-judicial decision on facts accordingly revealed. Furthermore, there existed no statutory authorization for any such investigation. We held information obtained by virtue of such a spurious post-hearing survey could not be used as the basis for any quasi-judicial decision.

The cases at bar stand on an entirely different footing. By statute defendant commission, a regulatory body, is authorized to at any time conduct investigations relative to operational procedures and activities of all truck operator or contract carriers. Code sections 474.18; 474.20; 327.2; and 327.4. See also Arrow Exp. Fwdg. Co. v. State Comm. Comm., 256 Iowa 1088, 1092-1094, 130 N.W.2d 451; 73 C.J.S., Public Administrative Bodies and Procedure, sections 81-83, pages 406-407; and 1 Am.Jur.2d, Administrative Law, sections 85-91, pages 880-890.

Also, the record before us is replete with evidence obtained in the course of the prehearing investigations. In addition petitioner was allowed reasonable opportunity to cross-examine all persons called as witnesses, including investigating officers, and to offer any evidence it desired. Petitioner was accorded every reasonable opportunity not only to meet, overcome, refute, explain or rebut all adverse testimony, but also to present any evidence favorable to its position. Full play was accorded our commonly accepted judicial practice in adversary proceedings. In this regard see Koelling v. Trustees of Skiff Hospital, 259 Iowa 1185, 1197-1198, 146 N.W.2d 284, and 2 Am.Jur.2d, Administrative Law, sections 413-426, pages 223-237.

Petitioner does point with some degree of emphasis to the fact respondent, in its findings attendant upon both orders here in dispute, referred to evidentiary matters, "and other things of which it had knowledge".

This, it must be conceded, is an inappropriate and unfortunate choice of words, presumably lifted from our opinion in the case of In re Application of Illinois Central Railroad Co., 241 Iowa, 333, 338, 41 N.W.2d 98. But we were there dealing with the matter of hearing in connection with an application for a certificate of convenience and necessity, which is far removed from quasi-judicial proceedings relative to cease and desist or revocation orders. While use of the quoted or similar phraseology is disapproved in cases such as those at bar, we are satisfied it was here of little or no significance. In other words, it may constitute error, but under existing circumstances does not justify relief in the case at bar. See United States v. Pierce Auto Freight Lines, 327 U.S. 515, 527-531, 66 S.Ct. 687, 694-695; 73 C C.J.S., Public Administrative Bodies and Procedure, section 152, page 485; 2 Am.Jur.2d. Administrative Law, section 445, page 254, and Annos. 18 A.L.R. 2d 552.

VII. Trial court also found the record of proceedings, as a whole, disclosed bias on the part of defendant commission and upon that basis held it had acted arbitrarily and capriciously.

This blanket indictment makes it rather difficult to ascertain with any degree of certainty the exact premise upon which trial court based such holding.

At the outset, a rebuttable presumption of regularity and impartiality attends all official actions of defendant commission. Code section 622.56; State v. Rivera, Iowa , 149 N.W.2d 127, 131; Cherokee v. Illinois Cent. R. Co., 157 Iowa 73, 77, 137 N.W. 1053; 73 C.J.S., Public Administrative Bodies and Procedure, section 145, page 478; and 2 Am.Jur.2d, Administrative Law, sections 750-751, pages 650-653.

In an apparent effort to overcome this presumption petitioner, on appeal, makes reference to the fact that in a limited number of instances members of defendant commission interrupted proceedings before it to ask questions, comment upon applicable law, or to explain the reason for rulings on evidence offered.

Nothing is to be gained by setting forth the questions and statements to which petitioner alludes. It will suffice to point out, this court has repeatedly held, in similar instances, no bias or resultant prejudice appears. State v. Ladehoff, 255 Iowa 659, 671, 122 N.W.2d 829, and Scroggs Feed & Grain Co. v. Vos, 254 Iowa 620, 622-623, 118 N.W.2d 543. See also 88 C.J.S., Trial, sections 49-50, pages 124-137; and 53 Am.Jur., Trial, section 79, page 77.

Additionally trial court held, respondent acted illegally and in excess of its jurisdiction by proceeding against petitioner as the result of self-initiated investigations.

As heretofore revealed respondent is by law granted broad investigatory powers.

It is also accorded specific authority to suspend or revoke and cancel the permit held by any truck operator or contract carrier. Code sections 327.16 and 327.21; Peterson v. Iowa State Commerce Commission, 256 Iowa 964, 966, 129 N.W.2d 656; Arrow Exp. Fwdg. Co. v. State Comm. Comm., 256 Iowa 1088, 1096, 130 N.W.2d 451; Sherman v. Iowa State Commerce Commission, 253 Iowa 776, 113 N.W.2d 715; and Wood v. Iowa State Commerce Commission, 253 Iowa 797, 113 N.W.2d 710.

In connection with any investigation effected by it, defendant commission must, of necessity, evaluate resultant findings in order to determine whether further proceedings relative to questionable conduct on the part of a permittee should be initiated. This, perforce, requires some degree of predetermination as to law, facts and policy.

On the other hand it is axiomatic, an administrative hearing with reference to suspension or revocation of a

truck operator or contract carrier permit must be a fair one. Any such permittee is entitled to a hearing conducted in an impartial manner. Morgan v. United States, 304 U.S. 1, 14-15, 58 S.Ct. 773, 775, and Turnis v. Board of Education, 252 Iowa 922, 930, 109 N.W.2d 198.

However, a "fair day in court" is not defeated by the fact the hearing is before the same administrative authority which lawfully conducted a prehearing investigation or preferred charges. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 700-703, 68 S.Ct. 793, 803-804; Koelling v. Trustees of Skiff Hospital, 259 Iowa 1185, 1202-1205, 146 N.W.2d 284; 73 C.J.S., Public Administrative Bodies and Procedure, section 132, page 456, and 136; page 461; 2 Am.Jur.2d, Administrative Law, sections 410-412, pages 220-223; and Annos. 97 A.L.R.2d 1210, 1215.

The question now posed is whether the record as a whole discloses members of defendant commission entertained such bias toward petitioner that it was not accorded a fair hearing.

As here employed the term "bias" means adverse, preconceived mental attitude or disposition, toward a party to a controversy, of such weight and nature as to materially impair or destroy that impartiality essential to a fair hearing. It does not relate to views entertained regarding the subject matter involved and, though the words are sometimes used interchangeably, "bias" is not here deemed synonymous with prejudice. A man is not ordinarily prejudiced against another without being biased, but he may be biased without being prejudiced. In this regard see Bethlehem Steel Co. v. National Labor Relations Board, (D.C.), 10 F.2d 641, 651-652; In re Adoption of Richardson, 59 Cal.Rptr. 323, 331; Ensher, Alexander & Barsoom, Inc. v. Ensher, 37 Cal.Rptr. 327, 329, 225 Cal.App.2d 318; State ex rel. Mitchell v. Sage Stores Co., 157 Kan. 622, 143 P.2d 652, 654-655; Davis, Administra-

tive Law Text, Hornbook Series, chapter 12, pages 215-224; and Black's Law Dictionary, Fourth Ed., page 205.

And as stated in A. O. Smith Corporation v. N.L.R.B., (7 Cir.), 343 F.2d 103, 110: "'* * * Bias or prejudice or hostility becomes a justiciable issue only as it bears on the fairness of the hearing. It cannot be imputed to the fact-trier retroactively, as it were, because his mind has absorbed the impressions left by a full and fair hearing.' (Authorities cited.)" See also Annos. 97 A.L.R.2d 1210, 1213.

A review of the record as a whole fails to reveal any evidence supporting trial court's finding to the effect respondent was biased.

VIII. Although defendant commission's authority to issue a cease and desist order is not challenged we are persuaded the power to alter, amend or revoke a truck operator permit includes the lesser right to direct a desistance of any lawful or prohibited practice. See 2 Am.Jur.2d, Administrative Law, section 467, page 279.

Be that as it may, trial court held respondent acted capriciously, arbitrarily, and without support in the record in the issuance of its March 9, 1964, cease and desist order.

This holding appears to be foundationed upon the premise the subject order fails to state with sufficient certainty the services or practices to be discontinued by petitioner.

In that regard an administrative agency is generally required, even apart from any statutory mandate, to make findings of fact on issues presented in any adjudicatory proceeding. 73 C.J.S., Public Administrative Bodies and Procedure, section 139, page 464; 2 Am.Jur.2d, Administrative Law, section 447, page 256; and Davis, Administrative Law Text, Hornbook Series, sections 16.01-16.05, pages 292-296.

Despite the fact no specific form need be employed in setting forth these findings and some degree of generaliza-

tion is permissible, they must be sufficiently certain to, (1) enable a reviewing court to ascertain with reasonable certainty the factual basis and legal principle upon which the administrative officer or body acted, and (2) inform the parties of what they are required or permitted to do or are prohibited from doing. See 73 C.J.S., Public Administrative Bodies and Procedure, section 140, page 466; 2 Am.Jur.2d, Administrative Law, section 455, page 266; and 2 Davis, Administrative Law Treatise, section 16.05, page 444.

However, the courts in various jurisdictions are not in complete agreement as to the nature of those findings which are required. Underlying facts, drawn immediately from the evidence, sometimes called specific, subordinate or evidentiary, are basic facts. On the other hand ultimate facts, while not bare conclusions or mere expressions of statutory standards, are sequential, being determined by a process of reasoning and inference from basic facts. See 2 Am.Jur.2d, Administrative Law, section 456, page 269, and 2 Davis, Administrative Law Treatise, section 16.06, pages 451-454.

Absent a specific statutory standard, rules governing the requirements and sufficiency of findings of fact by a trial court are generally held applicable to those of an administrative agency. See 73 C.J.S., Public Administrative Bodies and Procedure, section 140, page 466.

In that area we have held ultimate findings of fact will suffice. Furthermore, those findings are to be broadly and liberally construed, rather than narrowly or technically. In case of doubt they will be construed to uphold rather than defeat the judgment. And, whenever from facts found others may fairly be inferred which will support the adjudication, such inference will be drawn. Schnabel v. Vaughn, 258 Iowa 839, 845-846, 140 N.W.2d 168; Rose v. John Deere Ottumwa Works, 247 Iowa 900, 907, 76 N.W.2d 756; and Van Riper v. Baker, 44 Iowa 450, 451.

It is also generally understood, and this court has held, in the interpretation of an adjudicatory order the entire instrument must be considered, together with all the proceedings, in order to determine its intent and purpose. Schnabel v. Vaughn, supra, and 73 C.J.S., Public Administrative Bodies and Procedure, section 143, page 475.

This brings us to the controverted cease and desist order quoted supra. Though not a model of clarity, this cessation edict meets essential standards of certainty.

Construed in the light of the foregoing principles the challenged desist order served to generally advise petitioner it was to discontinue all *intrastate* activities reserved to certificated or motor carriers. Stated otherwise petitioner was told all its *intrastate* operations as a carrier of goods for compensation must be discontinued, (1) between fixed and commonly known termini; (2) over more or less regularly established and commonly known routes. Construed as a whole the subject order was adequate.

By the same token it becomes evident the revocation order issued by defendant commission was sufficiently specific and definite.

IX. We conclude trial court erred in issuing the writs of injunction in both cases at bar and in setting aside, vacating and holding for naught the cease and desist, and revocation orders issued by respondent.

Both cases presented on this appeal must be accordingly reversed and remanded with instructions that trial court set aside the decree of injunction and judgment heretofore entered in each case adverse to defendant commission, and to enter in each case an appropriate decree or judgment dissolving any existing injunction, and annulling the writ of certiorari.

Both cases reversed and remanded with instructions.

All Justices concur.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 994

CEDAR RAPIDS STEEL TRANSPORTATION, INC., *Petitioner*

v.

IOWA STATE COMMERCE COMMISSION, ROCK ISLAND MOTOR TRANSIT, H & W MOTOR EXPRESS, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Joint Brief in Opposition for Respondents, Iowa State Commerce Commission, Rock Island Motor Transit and H & W Motor Express

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 984

CEDAR RAPIDS STEEL TRANSPORTATION, INC., *Petitioner*

v.

IOWA STATE COMMERCE COMMISSION, ROCK ISLAND MOTOR TRANSIT, H & W MOTOR EXPRESS, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Joint Brief in Opposition for Respondents, Iowa State Commerce Commission, Rock Island Motor Transit and H & W Motor Express

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OPINIONS BELOW

The opinion of the Supreme Court of Iowa (Pet. App. B, pp. 27-47) is reported at 260 Iowa , 160 N.W. 2d 825. The Order of the Supreme Court of Iowa denying rehearing without comment is not re-

ported nor printed in the Petition for Writ of Certiorari. The Opinion of the District Court of the State of Iowa (Linn County) is printed in Appendix B to the Petition for Writ of Certiorari (pp. 18-26). The Orders of the Iowa State Commerce Commission are printed in Appendix B to the Petition for Writ of Certiorari (pp. 13-17).

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on September 5, 1968 (Pet. App. B, p. 27). Rehearing was denied on November 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether state legislation providing for different methods of review, for separate, distinct classes of carriers is violative of the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States.

2. Whether, after lower court review of an administrative order and State Supreme Court review of the lower court's opinion, the attempt to raise supposed federal questions for the first time in a petition for Rehearing in the State Supreme Court constitutes timely presentation and preservation of a federal question so as to give this court jurisdiction.

3. Whether the Iowa Supreme Court's refusal to allow a lower court to review de novo the Orders of the Iowa State Commerce Commission deprives Petitioner of due process and equal protection of the laws in contravention of the provisions of the Fourteenth Amend-

ment to the Constitution of the United States when the lower court based its de novo review upon a statute exclusively applicable to another class of carrier (Section 474.28, Code of Iowa,) and upon its equitable powers as modified by Rules of Civil Procedure (Rules 320, et seq., Iowa Rules of Civil Procedures). (Pet. App. B. p. 25).

4. Whether the mere notation in an Order of the Iowa State Commerce Commission as to the Commission's knowledge of other things is sufficient to deprive Petitioner of due process in contravention of the Fourteenth Amendment to the Constitution of the United States in view of substantial evidence in the Record to support Commission findings.

STATUTES INVOLVED

The relevant portion of the Fourteenth Amendment to the Constitution of the United States is printed on page 3 of the Petition for a Writ of Certiorari. Certain statutes and a rule which Petitioner considers involved are printed in Appendix A to the Petition for Writ of Certiorari (pp. 11-12). Other statutes involved are printed in Appendix A hereto.

STATEMENT

1. The Petitioner

Petitioner is engaged in providing transportation to the public for hire and is a member of the class of carriers designated by Chapter 327, Code of Iowa, as Truck Operators and is the holder of a Truck Operator permit issued by the Iowa State Commerce Commission (R. p. 216, ll. 24-30). Petitioner's general office is located in Cedar Rapids, Iowa, and in 1963 it instituted and actively solicited intrastate traffic and pro-

vided irregular route less-than-truck-load service in a preferred territory comprising approximately the eastern half of the State of Iowa. (R. pp. 42-44).

2. Proceedings Before the Iowa State Commerce Commission

In 1963 the Iowa State Commerce Commission, pursuant to statutory authority, instituted an investigation of the Petitioner's intrastate operations and upon completion of the investigation, the Commission, by resolution and notice provided Petitioner with an opportunity to show cause why its Iowa Truck operator permit should not be revoked. (R. pp. 4-6). The Commission, after hearing in which Petitioner participated fully, found, by Order dated March 9, 1964, that Petitioner was conducting operations in the manner of that class of carrier designated by statute as a Motor Carrier in violation, of Chapter 325, Code of Iowa, and ordered Petitioner to "cease and desist" performing such unauthorized service. (Pet. App. B. pp. 13-15). The Commission, again pursuant to resolutions and notice, attempted to hold a second hearing in June 1964, to allow Petitioner an opportunity to show cause why its Iowa truck operator permit should not be revoked. (R. pp. 127-128; 141). Upon Petition, the Commission was temporarily enjoined from holding this second hearing by the District Court of Iowa for Linn County (R. pp. 138-140; 142). The Linn County District Court, after hearing, by ruling dated July 10, 1964, dissolved the temporary injunction previously issued and the Commission, again pursuant to notice, held the second hearing in August 1964. (R. p. 142). The Commission after hearing in which Petitioner participated fully, found that Petitioner continued to be in violation of Chapter 325, Code of Iowa,

and ordered the Petitioner's Truck Operator Permit revoked (Pet. App. B, pp. 16-17). No application for rehearing was filed with the Commission.

3. Proceedings Before the District Court for Linn County, Iowa

Petitioner brought two separate actions in the District Court for Linn County, Iowa, challenging the Cease and Desist Order and the Revocation Order. Petitioner filed its first petition, consisting of two divisions, in regard to the Cease and Desist Order on June 1, 1964. The first division prayed for the issuance of a Writ of Certiorari, the second division asked general equitable relief. (R. pp. 130-134). The Petitioner filed the second petition consisting of three divisions on January 7, 1965, in regard to the Commission's Revocation Order. The first division asked for issuance of a writ of certiorari and also asked for a stay of the Commission Order pending determination by the court. The Second division alleged that it was entitled to review of the Commission's Order under provisions of Section 474.28, Code of Iowa, and asked the court to find the Commission Order to be unreasonable, unjust, in excess of jurisdiction, and null and void. In addition, Petitioner requested a temporary injunction staying the effective date of the Commission Order until determination by the court. The third division asked for general equitable relief and also for a temporary and permanent injunction enjoining enforcement of the Commission Order. (R. pp. 196-202).

On January 7, 1965, the District Court entered an Order temporarily restraining enforcement of the Commission Revocation Order and on January 25, 1965, after hearing, entered an Order continuing the stay until determination of the causes, directing issu-

ance of a writ of certiorari and consolidating the causes for trial. (R. p. 203).

The District Court rendered its decision on December 12, 1966, finding in certiorari that the Commission acted arbitrarily, capriciously and unlawfully in failing to follow Commission rules and procedure, in issuing the Cease and Desist Order and the Revocation Order, in failing to set forth what would constitute a lawful operation for Petitioner, in failing to properly apply the law set forth in existing Iowa cases, in relying on "other things of which the Commission had knowledge", and that the Commission was biased. In the other divisions the District Court concluded, inter alia, that under Section 474.28, Iowa Code, it could effect a de novo review of the Commission's Orders and that upon suit for injunction the District Court was required to make a de novo review. The Commission's Cease and Desist Order and Revocation Order were declared null and void, and the Revocation Order permanently enjoined. (Pet. App. B, pp. 18-26).

4. The Iowa Supreme Court's Reversal of the District Court and Affirmance of the Commission's Orders

The Iowa Supreme Court, after full argument on oral submission of the case, in a unanimous opinion on September 5, 1968, reversed the District Court and affirmed the Commission's Orders (Pet. App. B, pp. 27-47).

The Iowa Supreme Court first examined the nature of Petitioner's pleadings, in both cases, and observed that the relief sought was that "basically obtainable in certiorari, aided by injunctive relief as an auxiliary remedy." (Pet. App. B, p. 30). With respect to Petitioner's allegation that it was entitled to review of the

Commission's Orders, under Section 474.28, Code of Iowa, the Iowa Supreme Court disagreed with the District Court and held that Section 474.28 did not apply. The Supreme Court noted:

> "The aforesaid statute is clearly confined to 'any railroad' aggrieved by a rule, order or regulation made by defendant commission. Petitioner fails to so qualify."
>
> "To give Section 474.28 the construction accorded it by trial court would require reading into that statute an intent and a meaning not therein expressed. The courts of this state do not possess any such prerogative." (Pet. App. B, pp. 30-31).

The Iowa Supreme Court also noted that the "right of appeal is purely a creature of statute" (Pet. App. B, p. 31), and that the statute under which Petitioner's permit was issued does not provide for appellate review. (Pet. App. B, p. 31).

The Supreme Court observed, however, that "absence of statutory right of appeal does not serve to deprive Petitioner of any judicial review," (Pet. App. B, p. 32) and held that "Petitioner's actions stand in certiorari and trial court erred in reviewing de novo respondent's 'cease and desist' and 'revocation' orders" (Pet. App. B, p. 33). With respect to the District Court's holding that the recitation of the phrase "and other things of which it had knowledge" in the Commission's Order and what the District Court considered the apparent reliance thereon was reversibel error (incidentally, never specifically raised as error in any of Petitioner's pleadings in the District Court (R. pp. 130-141; 196-202), the Iowa Supreme Court after stating:

> "The record before us is replete with evidence obtained in the course of the prehearing investiga-

> tions. In addition Petitioner was allowed reasonable opportunity to cross-examine all persons called as witnesses, including investigating officers, and to offer any evidence it desired. Petitioner was accorded every reasonable opportunity not only to meet, overcome, refute, explain or rebut all adverse testimony, but also to present any evidence favorable to its position. Full play was accorded our commonly accepted judicial practice in adversary proceedings."

(Pet. App. B, p. 41), conceded that the use of the questioned phrase was inappropriate and the Supreme Court of Iowa observed" . . . While use of the quoted or similar phraseology is disapproved in cases such as those at bar, we are satisfied it was here of little or no significance. In other words, it may constitute error, but under existing circumstances does not justify relief in the case at bar." (Pet. App. B, p. 42).

Petition for Rehearing was filed with the Iowa Supreme Court by the Petitioner herein and it was not until this point in the proceedings that the Petitioner first attempted to raise the constitutional issues, this Court is now asked to determine. The Iowa Supreme Court denied rehearing without comment.

ARGUMENT

1. The Petitioner first attempted to raise the constitutional questions presented herein by means of a Petition for Rehearing before the Iowa Supreme Court. The attempt to raise the questions at that late date was contrary to the repeated pronouncements of the Iowa Supreme Court that constitutional questions not raised below will not be considered. *Heinrichs* v. *Iowa State Highway Commission*, Iowa , 152 N.W. 2d 248 (1967); *Farmers Elevator Co.* v. *Chicago*

R.I. & P.R. Co., Iowa , 149 N.W. 2d 867 (1967); *Vershoor* v. *Miller*, Iowa, 143 N.W. 2d 385 (1966). Therefore, the Supreme Court of Iowa neither considered nor spoke to the constitutional questions raised for the first time on rehearing. The general rule in this regard as articulated in *Great Northern R.C.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932) is:

> ". . . That a constitutional question is urged too late if put forward for the first time upon a petition for rehearing . . ."

(See also *Live Oaks Water Assoc.* v. *Railroad Commission*, 269 U.S. 354 46 S.Ct. 149, 70 L.Ed. 305 (1926). Although, as with most rules of a general nature, an exception to this rule exists if the issues attempted to be raised on a petition for rehearing could not have been reasonably anticipated prior to decision, the Petitioner here could have, and should have, anticipated these issues prior to submission to the lower court since it would have been reasonable to assume that the lower court's decision may have been adverse to it. The grounds of the Iowa Supreme Court's decision do not supply a new or unexpected basis for the constitutional issues which Petitioner attempts to raise and they should be given no consideration by this Court.

2. Petitioner's claim that it has been denied due process of law and the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States because it does not have available to it the same method of review of Commission orders as another class of carriers is untenable. That the State of Iowa may classify carriers into different types and regulate them in a different manner goes without saying. *Iowa Mortor Vehicle Ass'n* v. *Board of Rail-*

road Commissioners, 207 Iowa 461, 221 N.W. 364 (1928), aff'd. 280 U.S. 529, 50 S.Ct. 151, 74 L.Ed. 595, (this case presented a question with respect to the classification of carriers including that class presently regulated under Chapter 327, Code of Iowa, to which Petitioner belongs). The distinctions between method of operation of carriers made in this case make it abundantly clear that distinctions can also be reasonably drawn between carriers which operate by highway and those which operate by rail. The Petitioner's attempt to place itself pari causa with another class of carrier should fail for, as the Iowa Supreme Court pointed out, it fails to qualify as a member of that class of carriers for which review is provided in Section 474.28, Code of Iowa (Pet. App. B, pp. 30-32), nor has this Court ever held that ". . . The states are required to establish avenues of appellate review . . ." *Rinaldi* v. *Yeager,* 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed. 2nd 577 (1966), at 384 U.S. 308. The equal protection of the laws to which the Petitioner is entitled under the federal constitution is that it be treated equally or on a par with the members of the same class of carriers to which it belongs. The Petitioner is deprived of neither due process of law nor equal protection of the laws under the federal constitution if it is not afforded the same privileges or remedies available to members of another separate, distinct class. *McGowan* v. *Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2nd 393 (1961); *Iowa Motor Vehicle Ass'n, et al.* v. *Board of Railroad Comm'rs et al.,* 207 Iowa 461, 221 N.W. 364 (1928), aff'd 280 U.S. 529, 50 S.Ct. 151, 74 L.Ed. 595.

The Legislature of Iowa has a wide latitude of discretion in making classifications of carriers and it may

validly classify based upon the manner or method of operation or equipment or by any other means where the classification is based upon real differences. *Iowa Motor Vehicle Ass'n et al.* v. *Board of Railroad Comm'rs et al.*, 207 Iowa 461, 221 N.W. 364 (1928), aff'd 280 U.S. 529, 50 S.Ct. 151, 74 L.Ed. 595.

In making the classification, the Iowa Legislature may, for purposes of regulation, provide different rules for different classes or extend to some classes privileges denied to others. The Legislature may within this wide discretion prescribe different remedies or rights for different classes or grant different methods of appeal or review for different classes without violating the prohibitions of the Fourteenth Amendment to the United States Constitution. The Petitioner should resort to the Iowa Legislature, not this Court, for change in the method of review of the orders of the Commission affecting the class of carrier to which it belongs.

3. The decision of the Iowa Supreme Court was based on an interpretation of a state statute regulating carriers within the state and this Court has repeatedly pronounced that it is bound by state appellate court interpretations of state statutes. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932). The substantive law as applied by the Iowa Supreme Court in the case at bar was consistent with prior determinations by that court.

Arrow Express Forwarding Co. v. *Iowa State Commerce Commission*, 256 Iowa 1088, 130 N.W. 2d 451 (1964); *Peterson* v. *Iowa State Commerce Commission*, 256 Iowa 964, 129 N.W. 2d 656 (1964); *Sherman* v. *Iowa State Commerce Commission*, 253 Iowa 776, 113

N.W. 2d 715 (1962); *Wood* v. *Iowa State Commerce Commission*, 253 Iowa 797, 113 N.W. 2d 710 (1962); *Circle Express Co.* v. *Iowa State Commerce Commission*, 249 Iowa 651, 86 N.W. 2d 888 (1957).

4. As a second ground for granting the writ of certiorari wherein Petitioner advances the proposition that the Iowa Supreme Court's finding that the Commission's use of the phrase "and other things of which it has knowledge" may constitute error but does not do so in the present case is a denial of due process of the Fourteenth Amendment to the Constitution of the United States.

Petitioner cites *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937), as an example for extra-record procedure and resultant court disapproval. The *Ohio Bell* case, *supra*, never cited to the Iowa Supreme Court until Petition for Rehearing, bears striking resemblance to the Iowa case of *In re Lone Tree Community School District*, Iowa , 150 N.W. 2d 637 (1967), on which Petitioner relied in brief and argument to the Iowa Supreme Court. (Pet. App. B, p. 41). The *Ohio Bell* case, like the *Lone Tree* case, *supra*, is readily distinguishable on its facts. In the *Ohio Bell* case the Commission ordered refunds on the basis of facts not spread on the record. In the case at bar the record is replete with evidence obtained by investigation and presented at hearing for the Petitioner to refute. Petitioner failed to so do. (Pet. App. B, p. 41). Petitioner participated fully in the development of this record, cross-examining witnesses and offering evidence. Petitioner "was accorded every reasonable opportunity not only to meet, overcome, refute, explain or rebut all adverse testimony, but also to present any evidence favorable to its position. Full

play was accorded our commonly accepted judicial practice in adversary proceedings." (Pet. App. B, p. 41). *U. S.* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 90 L.Ed. 821, 66 S.Ct. 687 (1945).

CONCLUSION

The effect of the Iowa Supreme Court's opinion in this case was nothing more than an admonition to the class of carriers designated by the Iowa Legislature as Truck Operators to remain in their sphere and to refrain from encroaching on the field of service reserved by the Iowa statutes for other classes of carriers. The decision of the Iowa Supreme Court is correct, there is no conflict of decisions, no further review by this Court of the Iowa Supreme Court's decision is, therefore, required. The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 26, 1969.

APPENDIX A

Statutes

325.1 *Definitions.* When used in this Chapter:

1. The term "motor vehicle" shall mean any automobile, automobile truck, motorbus, or other self-propelled vehicle, including any trailer, semitrailer, or other device used in connection therewith not operated upon fixed rails or track, used for the public transportation of freight or passengers for compensation between fixed termini, or over a regular route, even though there may be occasional, periodic, or irregular departures from such termini or route, except those owned by school corporations or used exclusively in conveying school children to and from schools.

2. The term "motor carrier" shall mean any person operating any motor vehicle upon any highway in this state.

3. The term "highway" shall mean every street, road, bridge, or thoroughfare of any kind in this state.

4. The term "commission" shall mean the Iowa state commerce commission.

5. The term "charter" means the agreement whereby the owner of a motorbus lets the same to a group of persons as one party for a specified sum and for a specified act of transportation at a specified time and over an irregular route.

6. The term "charter carrier" means a person who engages in the business of transporting the public by motorbuses under charter. The term "charter carrier" shall not be construed to include taxicabs or persons, firms or corporations having a license, contract or franchise with an Iowa municipality with a population of more than fifteen thousand people as shown by the last federal decennial census, to carry or transport passengers for hire, or a

municipality with a population of more than fifteen thousand people as shown by the last federal decennial census, engaged in the business of carrying or transporting passengers for hire, provided, however, that municipality or the person, firm or corporation having a license, contract or franchise with an Iowa municipality comply with sections 325.26, 325.28, 325.29, 325.31 and 325.35, or school bus operators when engaged in transportation involving any school activity or regular route common carriers of passengers.

325.6 *Certificate of convenience and necessity.* It is hereby declared unlawful for any motor carrier to transport over a regular route or between fixed termini any person or property, for compensation, from any point or place in the state of Iowa to another point or place in said state irrespective of the route, highway or highways traversed, including the crossing of any state line of the state of Iowa, or the ticket or bill of lading issued and used for such transportation, without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. No carrier of passengers shall operate as a charter carrier in this state unless already possessed of a certificate of convenience and necessity as a common carrier of passengers and operating in this state as such common carrier or possesses a certificate of convenience and necessity to engage in the business of a charter carrier.

474.18 *Investigation and Inquiry.* The commission shall investigate and inquire into the management of the business of all common carriers subject to the jurisdiction of said commission and keep itself well informed as to the manner and method in which the same is conducted. It shall have the right to obtain from them full and complete information necessary to enable the commission to perform its duties. It shall have power to require the attendance and testimony of witnesses, the production of all books,

papers, tariff schedules, contracts, agreements, and documents, relating to any matter under investigation, and to inspect the same and to examine under oath or otherwise any officer, director, agent, or employee of any common carrier; to issue subpoenas and to enforce obedience thereto.

Rules of Civil Procedure

306. *When writ may issue.* A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally.